90-29

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1990

JAMES C. PLEDGER, COMMISSIONER OF REVENUES ..... *Petitioner*

vs.

DANIEL L. MEDLOCK, COMMUNITY COMMUNICATIONS COMPANY AND THE ARKANSAS CABLE TELEVISION ASSOCIATION, INC., on behalf of themselves and all other similarly situated taxpayers ..... *Respondents*

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF ARKANSAS

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

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QUESTION PRESENTED FOR REVIEW

WAS THE APPLICATION OF THE ARKANSAS GROSS RECEIPTS TAX TO THE SALE OF CABLE TELEVISION SERVICE VIOLATIVE OF THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION BECAUSE THE TAX WAS NOT APPLIED TO THE SALE OF THE SERVICE OF UNSCRAMBLING SATELLITE TELEVISION SIGNALS?

LIST OF PARTIES

The parties to this proceeding are as follows: The Petitioner is James C. Pledger, Commissioner of Revenues for the Arkansas Department of Finance and Administration. The Respondents are Daniel L. Medlock, a citizen of Pulaski County, Arkansas; Community Communications Company, an Arkansas corporation which operates six separate cable television systems in Arkansas; and the Arkansas Cable Television Association, Inc., a trade organization composed of 80 cable television systems operators in Arkansas. These Respondents, in a class action lawsuit, represent all similarly situated taxpayers. The following parties are also Respondents in this proceeding: Jimmie Lou Fisher, the State Treasurer of Arkansas; Donald Venhaus, the County Judge of Pulaski County, Arkansas; Patricia Tedford, the Treasurer of Pulaski County, Arkansas; Pulaski County, Arkansas; Joann Boone, the Treasurer of the City of Benton, Arkansas; and the City of Benton, Arkansas. These Respondents were sued along with all similarly situated counties and cities in Arkansas. The City of Fayetteville, Arkansas intervened in this lawsuit and is also a Respondent.

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vs.

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ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

OPINIONS DELIVERED BELOW

The Order and Judgment of the Chancery Court of Pulaski County, Arkansas, First Division, is unreported and printed in its entirety at Appendix B hereto. The Opinion upon which the Chancery Court Order and Judgment was based is printed in its entirety at Appendix C hereto. The Opinion of the Supreme Court of Arkansas is reported at 301 Ark. 483, 785 S.W.2d 202 (1990), and is printed in its entirety at Appendix A hereto.

GROUNDS UPON WHICH JURISDICTION IS INVOKED

The Opinion of the Supreme Court of Arkansas was delivered on February 28, 1990 (See Appendix A). The Petitioner timely filed a Petition for Rehearing, which was denied by Order of the Supreme Court of Arkansas on April 2, 1990 (See Appendix D). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

". . . nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATUTORY PROVISIONS INVOLVED

Act 188 of 1987, codified at Ark. Code Ann. § 26-52-301(3)(D) (Supp. 1987) subjected to the Arkansas gross receipts tax sales of the following:

"Cable television services provided to subscribers or users. This shall include all service charges and rental charges whether for basic service or premium channels or other special service, and shall include installation and repair service charges and any other charges having any connection with the providing of cable television services."

Act 769 of 1989, codified at Ark. Code Ann. §26-52-301(3)(D)(i) (Supp. 1989), replaced Act 188 of 1987, and subjected to the Arkansas gross receipts tax sales of the following:

"Service of cable television, community antenna television, and any and all other distribution of television, video, or radio services with or without the use of wires provided to subscribers or paying customers or users, including all service charges and rental charges, whether for basic service, premium channels, or other special service, and including installation and repair service charges and any other charges having any connection with the providing of the said services."

Ark. Code Ann. §26-74-209(d) (1987) states:

"(d) If no election challenge is timely filed, there shall be levied, effective on the first day of the first calendar month subsequent to the expiration of the thirty-day challenge period, a one percent (1%) tax on the gross receipts from the sale at retail within the county of all items which are subject to the Arkansas Gross Receipts Act, §26-52-101 et seq., and, in every county where the local sales and use tax has been adopted pursuant to the provisions of this subchapter, there is imposed an excise tax on the storage, use, or consumption within

the county of tangible personal property purchased, leased, or rented from any retailer outside the state after the effective date of the sales and use tax for storage, use, or other consumption in the county, at a rate of one percent (1%) of the sale price of the property or, in the case of leases or rentals, of the lease or rental price, the rate of the use tax to correspond to the rate of the sales tax portion of the tax. The use tax portion of the local sales and use tax shall be collected according to the terms of the Arkansas Compensating Tax Act, § 26-53-101 et seq."

Ark. Code Ann. § 26-75-207(1987) states:

"(a) The governing body of any city may adopt an ordinance levying a local sales and use tax for the benefit of such city in accordance with the provision of this subchapter.

(b) The sales tax portion of any local sales and use tax adopted under this subchapter shall be levied by the governing body at the rate of one percent (1%) on the receipts from the sale at retail within the city of all items which are subject to taxation under the Arkansas Gross Receipts Act, § 26-52-101 et seq."

STATEMENT OF THE CASE

This case originated when Daniel Medlock, a cable television subscriber; Community Communications Company, an Arkansas corporation which operates cable television systems; and the Arkansas Cable Television Association, Inc., a trade organization composed of cable television operators in Arkansas, initiated a lawsuit in Pulaski County, Arkansas challenging the Arkansas Gross Receipts Tax on the sale of cable television service. Included as defendants in the lawsuit were James C. Pledger, Commissioner of Revenues for the State of Arkansas; Jimmie Lou Fisher, Treasurer of the State of Arkansas; Donald Venhaus, the County Judge for Pulaski County, Arkansas; Patricia Tedford, Treasurer of Pulaski County, Arkansas; Pulaski County, Arkansas; the City of Benton, Arkansas; Joann Boone, the Treasurer of Benton, Arkansas; and all other similarly situated counties and cities which passed a one percent local gross receipts tax under the provisions of Ark. Code Ann. §§ 26-74-209(d)(1987) and 26-75-207(1987). The City of Fayetteville, Arkansas intervened in the case.

Act 188 of 1987, codified at Ark. Code Ann. § 26-52-301(3)(D)(Supp. 1987), subjected to the gross receipts tax the sale of cable television services provided to subscribers or users, including all service charges and rental charges whether for basic service or premium channels or other special service, and installation and repair service charges. The Plaintiffs in this case argued, in pertinent part, that this Act violated their rights of freedom of speech and freedom of the press guaranteed by the First Amendment to the United States Constitution. The Chancery Court of Pulaski County, Arkansas found that although cable television service was entitled to First Amendment protection, the

taxation of such service in and of itself was not violative of the First Amendment as long as the state does not treat similarly situated entities differently. The Chancery Court further found that cable television programming requires a cable system's use of public property, which along with the distinct and unique benefits gained by cable from use of that property, distinguishes for constitutional purposes cable television from other communications media, justifying a different treatment for taxation purposes. (P. App. C-10). As a result, the Chancery Court dismissed the Plaintiffs' Complaint. (P. App. B-2). The Plaintiffs thereafter appealed this decision to the Supreme Court of Arkansas.

After the issuance of the Chancellor's order, Act 769 of 1989 was passed, which subjected the following sales to the Arkansas gross receipts tax:

> "Service of cable television, community antenna television, and any and all other distribution of television, video, or radio services with or without the use of wires provided to subscribers or paying customers or users, including all service charges and rental charges, whether for basic service, premium channels, or other special service, and including installation and repair service charges and any other charges having any connection with the providing of the said services."

The Supreme Court of Arkansas held that because Act 188 of 1987 levied a tax on cable television enterprises, but did not tax the proceeds resulting from the "unscrambling" of satellite signals, which the court found to be a similar service, the Act violated the First Amendment to the United States Constitution. (P. App. A-6). The Arkansas Supreme Court remanded the case to the Chancellor so that the taxes collected under this Act could be refunded to those persons who paid them.

Both the Petitioner and the Respondents timely filed Petitions for Rehearing which were denied by the Supreme Court of Arkansas on April 2, 1990. (P. App. D-1).

ARGUMENT

(REASONS FOR ALLOWANCE OF THE WRIT)

It is clear that cable television operators are entitled to First Amendment protection. However, it is also clear from past decisions of this Court that the protections of the First Amendment are not absolute. This point was recognized in the case of *City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488, 106 S.Ct. 2034, 90 L.Ed.2d 480 (1986), where this Court stated:

> "Of course, the conclusion that respondents' factual allegations implicate protected speech does not end the inquiry. Moreover, where speech and conduct are joined in a single course of action, the First Amendment values must be balanced against competing societal interests." (90 L.Ed.2d at 487, 488).

This Court has also stated:

> ". . . every civil and criminal remedy imposes some conceivable burden on First Amendment protected activities. One liable for a civil damages award has less money to spend on paid political announcements or to contribute to political causes, yet no one would suggest that such liability gives rise to a valid First Amendment claim." *Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 106 S.Ct. 3172, 92 L.Ed.2d 568, 577 (1986).

Any governmental regulation can conceivably implicate the First Amendment, but such an implication does not automatically lead to a finding that First Amendment protections have been violated. Cable television is distinct from all other electronic broadcast media because, as was

pointed out by the Chancellor in his opinion, cable is the only medium that makes physical use of the public ways to string its cable and to maintain and service the cable system. (P. App. C-7). As a result, cable television impacts upon and benefits from governmental property in ways that no other medium does. The United States Court of Appeals for the Eighth Circuit stated:

> "In its recent decision in *Los Angeles v. Preferred Communications, Inc.* ___ U.S. ___ , 106 S.Ct. 2034, 90 L.Ed.2d 480 (1986), the Court suggested that the cable medium may be distinguishable from the newspaper medium and that more government regulation of the cable medium may be permissible because cable requires use of public ways and installation of cable systems may disrupt public order . . . Different communications media are treated differently for First Amendment purposes . . ." *Central Telecommunications, Inc. v. TCI Cablevision, Inc.*, 800 F.2d 714, 715 (8th Cir. 1986).

The Eighth Circuit Court of Appeals adopted the reasoning of not only this Court, but also that of the United States Courts of Appeals for the Seventh and Tenth Circuits. *Omega Satellite Products v. City of Indianapolis*, 694 F.2d 119 (7th Cir. 1982); *Community Communications v. City of Boulder*, 660 F.2d 1370 (10th Cir. 1981).

The Supreme Court of Arkansas dismisses the Chancellor's finding that use of the public ways and disruption of public order make cable television distinctively dissimilar from all other media, stating that the above cited cases involve regulation related to access to or use of the rights of way rather than a tax which has no relationship to the acquisition of the privilege of using public property.

(P. App. A-3). However, whether the complaint is made about a sales tax, a franchise fee, a franchise grant, or access regulations, it is still a complaint about government regulation. Therefore, this distinguishing feature of cable television justifies the differing tax treatment under Act 188 of 1987.

At Page 103 of Appellants' Abstract, the testimony of Gail Price, then Manager of the Sales and Use Tax Section of the Arkansas Department of Finance and Administration, is abstracted as follows:

> "About 8 or 10 years ago, I participated in meetings at the Revenue Department concerning the taxation of cable television services and it was considered in that framework to be a taxable service already within the law as it existed (R. 1008-1009). The Revenue Division waited for the legislature to change the Sales Tax law to add cable television as a designated taxable service, because we just considered it another service that was taxable and we decided to wait so that it would be clear that it would be included within the statute. There was never any indication or statement made that cable television was going to be singled out for special tax treatment, it was just another service they were trying to make taxable." (TR 1010) (P. App. E-1).

Consequently, the General Assembly acted in the next legislative session after the trial and adopted Act 769 of 1989, which extended the state and local sales tax to charges made for "scrambled" satellite broadcast television subscription services sold to an Arkansas citizen, further evidencing a lack of prior knowledge that a charge was collected with regard to satellite television service.

In this case, as in many, the constitutionality of an Act

depends on the existence or non-existence of certain facts. If, for instance, a gross receipt producing satellite television service did not exist, then the Supreme Court of Arkansas would find Act 188 of 1987 constitutional since cable television has been found to be distinguishable from the print media. Act 188 was deemed unconstitutional only because satellite television is similarly situated to cable television in that both deliver essentially the same message and both have gross receipts for a sale of the service. The only difference between Act 188 of 1987 and Act 769 of 1989, which the Court found constitutional, is the added element of unscrambled satellite television.

The record indicates that the legislature was not aware of a gross receipt producing satellite television service when Act 188 was passed. When legislative findings of fact are relevant to a judicial determination, such findings are entitled to due respect. *Katzenbach v. Morgan*, 384 U.S. 641 (1966). The validity of legislation which would be necessary or proper under a given state of facts does not depend on the actual existence of the supposed facts. It is enough if the lawmaking body may rationally believe such facts to be established. *Re: Yun Quong*, 195 Cal. 508, 114 P. 835 (1911).

Cable and satellite television are rapidly growing and changing industries. Cable service of a general nature in Pulaski County was less than 10 years old when this lawsuit was filed. It is certainly not unheard of for the government and the legislature to lag behind in developing regulation and taxation of new and rapidly developing industries. The legislature passed Act 188 of 1987 in reaction to the "new" cable television industry to collect a tax on a definable service. When the State "discovered" a gross receipt producing satellite television industry through testimony in this case, Act 769 of 1989 was passed. Surely it cannot be

expected that the legislature will anticipate new industries before they are known to exist.

The Arkansas General Assembly acted at the earliest opportunity to correct what was suggested to be, but at the time not proven to be a difference in the tax treatment of two similar services, cable television service and satellite service.

It might be argued that lack of discriminatory intent on the part of the General Assembly should not be considered relevant as long as the resulting legislation has a discriminatory effect. In *Arkansas Writers' Project, Inc. v. Ragland,* 481 U.S. 421, 95 L.Ed.2d 209, 107 S.Ct. 1722 (1987), this Court stated:

> "Both types of discrimination can be established even where, as here, there is no evidence of an improper censorial motive . . . This is because selective taxation of the press — either singling out the press as a whole or targeting individual members of the press — poses a particular danger of abuse by the State." (95 L.Ed.2d at 219)

However, the issue argued here goes beyond merely whether the General Assembly had a discriminatory intent. Again, it is submitted that the relevant issue for purposes of this Petition is whether there was knowledge by the General Assembly that another similar class of individuals to the class of taxpayers affected even existed at the time the Act was enacted.

Without giving consideration to the fact that the General Assembly can only enact legislation with regard to what is known, the opinion of the Supreme Court of Arkansas places an impossible standard to follow in

enacting non-discriminatory taxation legislation. This decision would require the General Assembly to be clairvoyant with regard to the ever-advancing technology and competition in this and other scientific fields, so that such legislation will not be found in the future to be discriminatory as to classes of taxpayers which are suddenly placed in a situation which makes a previously dissimilar class of taxpayers similar.

The specific question of whether Act 188 of 1987 was violative of the First Amendment because of its differing treatment for tax purposes of sale of cable television service and the "descrambling" of satellite television signals has not been, but should be, settled by this Court. Nevertheless, the Supreme Court of Arkansas decided this case by using the above cited cases of this Court and of United States Courts of Appeals dealing with the subject matter of this case, cable television, if not the exact question presented for review. However, the interpretation of these cases by the Supreme Court of Arkansas conflicts with the actual rule of these cases. In either event, there is justification for granting the Petitioner's request for a Writ of Certiorari to the Supreme Court of Arkansas under 28 U.S.C. § 1257(a).

CONCLU'SION

For the foregoing reasons, certiorari should issue to the Supreme Court of Arkansas so that this honorable Court may review and correct the decision below.

Respectfully submitted,

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Counsel of Record

CERTIFICATE OF SERVICE

I, William E. Keadle, hereby certify that I have served true and correct copies of the above and foregoing petition as provided by Supreme Court Rules 29.3 and 29.5(b) to each of the following, by U.S. Mail, postage prepaid, addressed as follows:

Honorable Lee A. Munson
Chancellor
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this 28th day of June, 1990.

/s/ William E. Keadle

APPENDIX A

SUPREME COURT OF ARKANSAS

No. 89-89

Daniel L. Medlock, et al., Appellants	★	Appeal from the Chancery Court of Pulaski County, Arkansas, First Division
v.	★	
James C. Pledger, et al., Appellees.	★	

Filed February 28, 1990

DAVID NEWBERN, Associate Justice.

The question in this case is whether the imposition of a sales tax on cable television service is an unconstitutional, and thus illegal, exaction because the tax does not apply to other mass communications media. We hold that, for a time, the tax was illegal because it was not levied on other, similar services, such as satellite television programming. Now that the tax has been made to apply to all similarly situated businesses, however, its illegality has been cured. We remand the case to the chancellor so that the taxes illegally collected may be refunded to those who paid them.

By Act 188 of 1987 the general assembly added to the services to be subject to the sales tax:

> Cable television services provided to subscribers or users. This shall include all service charges and rental charges whether for basic service or premium channels or other special service, and shall include installation and repair service charges and any other charges having any connection with the providing of cable television services.

By Act 769 of 1989, the language was changed to the following:

> Service of cable television, community antenna television, and any and all other distribution of television, video, or radio services with or without the use of wires provided to subscribers or paying customers or users, including all service charges and rental charges, whether for basic service, premium channels, or other special service, and including installation and repair service charges and any other charges having any connection with the providing of the said services.

Act 769 was signed by the governor on March 21, 1989, and in accordance with its emergency clause, became law on July 1, 1989. The act is now codified as Ark. Code Ann. § 26-52-301(3)(D)(i) (Supp. 1989).

Act 188 was promptly challenged by the appellants, Daniel L. Medlock, Community Communications Co., and the Arkansas Cable Television Association, Inc., on behalf of themselves and all other similarly situated taxpayers. The appellees are James C. Pledger, Commissioner of Revenues, and various state, county, and city officials, Pulaski County, the City of Benton, and all other similarly situated counties and cities. The City of Fayetteville intervened.

As Act 769 had not become law when the chancellor made his ruling, the sole question before him was the constitutionality of Act 188. The taxpayers challenged it as being in violation of their rights of freedom of speech and freedom of the press guaranteed by the First Amendment, their right to equal privileges and immunities guaranteed by U.S. Const., art. 4, § 2, and Ark. Const. art. 2, § 18, and

their right to equal protection of the laws guaranteed by the Fourteenth Amendment and Ark. Const. art. 2, § 3. They also claimed protection under 47 U.S.C. § 542 and the Supremacy Clause. All of the counts in the complaint boiled down to a claim of discrimination against the cable television medium, and that is the essence of the arguments on appeal, although they are segmented as was the complaint.

1. Public rights of way

In his order ruling against the taxpayers, the chancellor distinguished the cable medium from others on the ground that it required use of a public right of way in addition to the fact that there are no gross proceeds to be taxed in the case of, for example, broadcast television. There was uncontradicted testimony to the effect that a cable television enterprise pays a franchise fee for the use of the right of way. It is true that the use of public rights of way by cable television may subject it to more regulation as has been suggested in some cases. *See City of Los Angeles v. Preferred Communications, Inc.*, ___ U.S. ___, 106 S.Ct. 2034, 90 L.Ed. 480 (1986); *Central Telecommunications, Inc. v. TCI Cablevision, Inc.*, 800 F.2d 714 (8th Cir. 1986); *Omega Satellite Products v. City of Indianapolis*, 694 F.2d 119 (7th Cir. 1982); *Community Communications v. City of Boulder*, 660 F.2d 1370 (10th Cir. 1981). However, those cases involve regulation related to access to or use of the rights of way rather than a tax which has no relationship to the acquisition of the privilege of using public property. We thus find the fact that cable television uses public property and must obtain a franchise to do so should not control the result in this case.

2. The First Amendment

We need not indulge in a long explanation of the history of cable television and the cases which have gradually recognized the entitlement of such enterprises to First Amendment protection. A good discussion of it is found in *Quincy Cable TV, Inc. v. F.C.C.*, 768 F.2d 1434 (D.C. Cir. 1985).

The Supreme Court has left no doubt about the matter. In *City of Los Angeles v. Preferred Communications, Inc., supra*, it was held that the complaint of a cable television company alleging violation of the company's rights guaranteed by the First Amendment should not have been dismissed for failure to state a claim upon which relief could be granted. The court made it clear that the complaint implicated the First Amendment and facts should be developed to determine how to balance the First Amendment protection to which a cable television company was entitled against the city's right to regulate the company's use of public property.

3. Discrimination

Entitlement to protection under the First Amendment does not mean entitlement to absolute freedom from regulation by the government. *U.S. v. O'Brien*, 391 U.S. 367 (1968). If a tax is to be applied to an enterprise entitled to First Amendment protection, it must be a general tax and must not be a form of censorship. In *Grosjean v. American Press Co.*, 297 U.S. 233 (1936), Louisiana was held to have violated the First Amendment by imposing a tax on newspapers circulating more than 20,000. The court recognized that the press may be subjected to taxation but not if the tax is discriminatory and functions as a censor of some newspapers but no others.

In *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575 (1983), it was held that a Minnesota use tax on ink and paper purchases over $100,000 was invalid because its impact was on a few newspapers and one in particular. Unlike the *Grosjean* case, there was no direct implication of censorshp, but the tax was found to discriminate among newspapers and thus to be invalid. The Supreme Court again recognized, however, that the press is subject to a general, nondiscriminatory tax.

In *Arkansas Writers' Project v. Ragland*, ___ U.S. ___, 107 S.Ct. 1722, 95 L.Ed. 209 (1987), the Supreme Court held that a tax which was applied to some, but not other, magazines sold in Arkansas was in violation of the First Amendment.

In none of the cases we have discussed above, and in none of the other cases cited to us, do we find the Supreme Court holding that, for example, the failure to tax newspapers in the same manner as radio broadcasts violates the First Amendment. Each of the cases involved discrimination among competing mass communicators, each of whom was entitled to First Amendment protection. The taxpayers argue here that cable television is entitled to exemption from the sales tax because newspaper sales are not taxed and subscription magazine sales are not taxed. They would like us to issue a ruling which would invalidate not only Act 188 but, in effect, Act 769 as well. We decline to do so. As noted above, Act 769 was not before the court in this case, and we are unwilling to hold that all mass communications media must be taxed in the same way. It would be impossible to impose a tax which would have the same effect on broadcast television, the delivery of which produces no direct "gross proceeds," and cable television. We must, however, hold that a tax which discriminates between mass communi-

cators delivering substantially the same service runs afoul of the First Amendment and the cases which prohibit discriminatory taxation among the purveyors of a particular medium.

Act 188 levied a tax on cable television enterprises but did not tax the proceeds resulting from the "unscrambling" of satellite signals. The similarity of the services is demonstrated in the testimony of Paul Gardner, Jr., president of the Arkansas Cable Television Association. He testified that his company offered both cable service and decoders for "unscrambling" satellite television broadcasts which a viewer using a satellite dish could not otherwise receive. He testified that his company charged the same to a cable viewer for the premium HBO channel, for example, as it charged a satellite viewer. Act 188 thus imposed a tax which cannot pass First Amendment muster, and we must remand this case to the chancellor for orders consistent with this opinion.

Reversed and remanded.

Dudley, J., not participating.

APPENDIX B

CHANCERY COURT OF PULASKI COUNTY, ARKANSAS
FIRST DIVISION

No. 87-2401

DANIEL L. MEDLOCK, COMMUNITY COMMUNICATIONS COMPANY AND THE ARKANSAS CABLE TELEVISION ASSOCIATION, INC., on behalf of themselves and all other similarly situated taxpayers, Plaintiffs	★	
v.	★	
JAMES C. PLEDGER, COMMISSIONER OF REVENUES; JIMMIE LOU FISHER, TREASURER OF THE STATE OF ARKANSAS; DONALD VENHAUS, COUNTY JUDGE, PULASKI COUNTY, ARKANSAS; PATRICIA TEDFORD, TREASURER, PULASKI COUNTY, ARKANSAS; PULASKI COUNTY, ARKANSAS; JOANN BOONE, TREASURER, CITY OF BENTON, ARKANSAS; THE CITY OF BENTON, ARKANSAS; and all other similarly situated counties and cities, Defendants	★	Order and Judgment
CITY OF FAYETTEVILLE, ARKANSAS, Intervenor	★	

Filed March 13, 1989

ORDER AND JUDGMENT

Based upon the Opinion containing this Court's findings of fact and conclusions of law entered in this cause on March 10, 1989, wherein this Court determined that Act 188 of 1987 [Ark. Code Ann. § 26-52-301(3)(D)] is constitutionally valid, both facially and in its application, as against the First Amendment and Equal Protection challenges of plaintiffs; and

Based upon the further findings by this Court that said law is a valid exercise of the State's police power and does not violate Article 2 Section 18 of the Arkansas Constitution or any provision of the Cable Communications Policy Act of 1984;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that plaintiffs' complaint be dismissed; that the Preliminary Injunction entered in this case on August 28, 1987 be and is hereby dissolved; that all funds previously required herein to be deposited into an interest-bearing escrow account now be released; and that all escrow requirements and other restrictions previously imposed herein against defendants be and are hereby dissolved and removed.

Entered this 13th day of March, 1989.

/s/ Lee A. Munson
Chancellor

APPENDIX C

CHANCERY COURT OF PULASKI COUNTY, ARKANSAS
FIRST DIVISION

No. 87-2401

DANIEL L. MEDLOCK, COMMUNITY COMMUNICATIONS COMPANY AND THE ARKANSAS CABLE TELEVISION ASSOCIATION, INC., on behalf of themselves and all other similarly situated taxpayers,
Plaintiffs

v.

JAMES C. PLEDGER, COMMISSIONER OF REVENUES; JIMMIE LOU FISHER, TREASURER OF THE STATE OF ARKANSAS; DONALD VENHAUS, COUNTY JUDGE, PULASKI COUNTY, ARKANSAS; PATRICIA TEDFORD, TREASURER, PULASKI COUNTY, ARKANSAS; PULASKI COUNTY, ARKANSAS; JOANN BOONE, TREASURER, CITY OF BENTON, ARKANSAS; THE CITY OF BENTON, ARKANSAS; and all other similarly situated counties and cities,
Defendants

CITY OF FAYETTEVILLE, ARKANSAS,
Intervenor

Opinion

Filed March 10, 1989

OPINION

From the evidence introduced at the hearing on plaintiffs' motion for preliminary injunction, the evidence introduced at trial, as well as the arguments and authorities cited by the parties in their briefs, the Court makes the following Findings of Fact and Conclusions of Law pursuant to Rule 52(a) of the Arkansas Rules of Civil Procedure:

FINDINGS OF FACT

1. Plaintiffs in this action are Daniel L. Medlock, a citizen of Pulaski County, Arkansas, and a subscriber to cable television services. Community Communications Company, is an Arkansas corporation which operates 6 separate cable television systems in south Arkansas at Monticello, Warren, Arkansas City, Eudora, Tillar/Reed and East Camden. The Arkansas Cable Television Association, Inc. is a trade organization composed of 80 of the approximate 100 cable television system operators in the State of Arkansas.

2. The defendants are James C. Pledger, the Commissioner of Revenues and the person charged with collecting the state and local sales taxes in question each month from the individual cable operators. Jimmie Lou Fisher is the Treasurer of the State of Arkansas and is the person charged with receiving all collected state and locai sales tax monies from the Commissioner of Revenues and then distributing such state sales taxes to the respective agencies under the Revenue Distribution Act and all local sales taxes to the respective counties and cities in the State of Arkansas wherein a local sales tax has been imposed. Donald Venhaus and Patricia Tedford are, respectively,

County Judge and Treasurer of Pulaski County, Arkansas. Pulaski County, Arkansas is one of approximately forty-two counties wherein a county wide local sales tax was imposed as of the time of trial. Joann Boone is the Treasurer of the City of Benton, Arkansas, and the City of Benton, Arkansas is one of approximately eighty municipalities within the State of Arkansas wherein a local municipal sales tax is imposed.

3. Testimony at trial established that there are approximately one hundred cable system operators providing cable television services in the State of Arkansas to approximately four hundred thousand separate subscriber-customers. These systems vary in size from only a few one hundred subscriber-customers up to one system in Pulaski County, Arkansas with sixty-five thousand subscriber-customers.

4. These cable television system operators provide cable television service to their subscriber-customers in return for a monthly subscription fee. There are generally several levels of service provided, with additional charges being made by the operators for greater levels of service or what are generally referred to as "premium channels" or "pay channels."

5. The evidence at trial established that there are more programming services available to cable operators than can be carried on most cable systems in Arkansas. Witnesses who operated cable television systems in the State of Arkansas testified that they were constantly reviewing the choice of programming to be offered to their customer-subscribers. Specifically, Mr. Gardener, the owner and operator of Community Communications Company testified that in his six cable systems there was no exact uniformity of the

programming offered. Instead, though each of his six cable systems offered some of the same programming, he chose to make some programming different in each system because of the particular interests of the individual subscribers in each of the systems.

6. Evidence introduced by Plaintiffs' witnesses at the various hearings in this case has established that cable television system operators in the State of Arkansas make a variety of programming available to their subscriber-customers. Some of the programming is a retransmission of original works by others, while some of the programming is actually originated by the cable television system operator or is a cable casting of programming produced specifically for cable television system distribution in Arkansas.

7. The "cable casting" by cable television system operators provides Arkansans with a variety of programming which presents a mixture of news, information and entertainment. This programming seeks to provide a wide variety of topics and formats, including regular news and entertainment programming, public access channels, public announcements and electronic bulletin board.

8. The plaintiffs introduced a two-minute video tape of examples of programming produced exclusively for cable television distribution in the State of Arkansas. Such programming including agricultural service reports, policy commentary in the State Legislature's activities, industrial incentive programming and educational training, in addition to a variety of entertainment programming offered by cable television operators.

9. The owner-operators of two cable systems as well as the Executive Director of the Arkansas Cable Television

Association, Inc. testified that they considered cable television programming to be the equivalent of "an electronic magazine".

10. The operator of one small system testified that his system even provided an electronic billboard service where his system's customer-subscribers could send messages (for example birthday greetings) to other customers of the same system. The operator of Community Communications Company testified that his cable systems generated some original programming. The company system at Warren, Arkansas cable cast the City Council and school board meetings, the local high school football games, and coverage of the Warren Pink Tomato Festival.

11. Since 1941, Arkansas has imposed a general sales tax upon the gross proceeds derived from the sale of all tangible personal property and from the sale of certain services. Ark. Code Ann. § 26-52-101, et seq. Since late 1981, Arkansas' counties and cities have been able to enact local option sales taxes that apply to the sales of the same goods and services as does the state sales tax. These local taxes may be imposed upon a county wide basis or only within the borders of one municipality. These local sales taxes are collected and administered by the Commissioner of Revenues in the same manner as he administers the State sales taxes. As of the time of trial, approximately forty-two counties and over eighty municipalities in Arkansas imposed these local sales taxes upon the sale of the same goods and services that are taxed by the State sales tax laws.

12. Mahlon Martin, the Director of the Arkansas Department of Finance and Administration, testified that the State of Arkansas had never prior to July 1, 1987 attempted to subject the charges made by cable operators to State and local sales taxes.

13. Act 188 of 1987 was signed into law by Governor Clinton on March 12, 1987, to be effective on July 1, 1987. Act 188 of 1987 [Ark. Code Ann. § 26-52-301(3)(D)] provides as follows:

> There is levied an excise tax of three percent (3%) upon the gross proceeds or gross receipts derived from all sales to any person of the following:
>
> (D) Service of cable television provided to subscribers or users including all service charges and rental charges, whether for basic service or premium channels or other special service, and including installation and repair service charges and any other charges having any connection with the providing of cable television services.

14. The Manager of the Sales & Use Tax Section of the Revenue Division testified that July 1, 1987 was the first time that the State of Arkansas had ever attempted to impose the State and local sales taxes upon charges for cable television services.

15. On the passage of Act 188 of 1987, the Revenue Division of the Arkansas Department of Finance and Administration notified all cable television system operators in the State of Arkansas that they would have to register with the Sales & Use Tax Section, secure Sales Tax Permit Numbers, and begin to collect and remit the applicable state and local sales taxes imposed in their respective communities on cable television services provided on or after July 1, 1987. One cable television system operator testified that his company acted as a collecting agent for scrambled satellite television broadcast system charges in his area. The owner of Community Communi-

cations Company testified that his company also acted as collecting agent for scrambled satellite broadcast services in his area and that he invoiced his customer-subscribers for both cable television system services and scrambled satellite broadcast services approximately the same amount each month. This operator testified that he applied the state and local sales taxes only to the charges made to the delivery of services by his cable system, while not applying the tax to the charges made by his company for delivery of television services by scrambled satellite television broadcast directly to the subscriber-customer's own "earth station".

16. Cable television enjoys universal access to the homes of subscriber-customers and requires use of public ways for provision, maintenance and repairing of its property and services. *Central Telecommunications, Inc. v. TCI Cablevision, Inc.*, 800 F.2d 711 (8th Circuit 1986).

CONCLUSIONS OF LAW

1. The Court has subject matter jurisdiction over this controversy pursuant to the provisions of Article 16, Section 13 of the Arkansas State Constitution. The Court also has personal jurisdiction over each of the parties to this case.

2. Cable television operations are covered by the First Amendment to the Constitution of the United States. The First Amendment privileges apply to both the cable television system operators and to the cable television system subscriber's right to receive cable programming.

3. Though the United States Supreme Court has not specifically ruled upon the extent of First Amendment Protective Rights afforded to cable television, the Court in the case of *City of Los Angeles v. Preferred Communi-*

cations, Inc., 474 U.S. ___, 106 S.Ct. 2034 (1986), recognized that cablecasting is to be afforded First Amendment protected rights. There, in a case involving the cable operator's attack upon the City of Los Angeles' refusal to grant it a non-exclusive franchise to operate, the Supreme Court held:

> We do think that the activities in which respondent allegedly seeks to engage plainly implicate First Amendment interests. Respondent alleges:
>
> > The business of cable television, like that of newspapers and magazines, is to provide its subcribers with a mixture of news, information and entertainment. As do newspapers, cable television companies use a portion of their available space to reprint (or retransmit) the communication of others, while at the same time providing some original content. App. 3A
>
> Thus, through original programming or by exercising editorial discretion over which stations or programs to include in its repertoire, respondent seeks to communicate messages on a wide variety of topics and in a wide variety of formats. We recently noted that cable operators exercise a "significant amount of editorial discretion regarding what their programming will include." *FCC v. Midwest Video Corp.*, 440 U.S. 698, 707, 99 S.Ct. 1435, 1445 (1979). Cable television partakes of some of the aspects of speech and the communication of ideas as to the traditional enterprises of newspapers and book publishers, public speakers, and pamphleteers. Respondent's proposed activities would seem to implicate First Amendment interests as do the activities of wireless broadcasters,

> which were found to fall within the ambit of the First Amendment in *Red Lion Broadcasting Co. v. FCC, supra*, 395 U.S., at 386 89 S.Ct. 1804, even though free speech aspects of the wireless broadcasters' claim were found to be outweighed by the government interest in regulating by reason of the scarcity of frequencies.

4. This Court must determine the extent of First Amendment Protected Rights of cable television. The First Amendment provides that "Congress shall make no laws . . . abridging the freedom of speech . . . or the press". The United States Supreme Court, in the case of *Miami Herald Publishing Company v. Tornillo*, 418 U.S. 241, 49 S.Ct. 2831 (1974), held that the State of Florida could not pass a law requiring a newspaper to provide, free of cost, space for rebuttal by a political candidate that had been denounced by the newspaper in an editorial. The Supreme Court recently ruled, in the case of *City of Lakewood v. Plain Dealer Publishing Company*, 108 S.Ct. 2138 (1988) that a city, by ordinance, could not ban the newspapers' right to place coin operated distribution boxes upon the streets of the city simply because such racks or boxes interfered with the aesthetic qualities of the city's neighborhoods.

5. Early on in the development of the wireless broadcast of radio and television, the Courts established that both of these mediums were entitled to claim First Amendment Protected Rights. However, even though they enjoyed First Amendment Protections, the Supreme Court ruled that access to these mediums could be controlled in spite of the First Amendment protected guarantees because governmental interests were served by the allocation of a limited number of broadcast frequencies that are technically available.

6. Based upon the evidence submitted in this case and upon decisions of Federal Courts interpreting the extent of First Amendment Protected Rights to be afforded cable television system operations, the Court must conclude that cable television system operators and subscribers are not entitled to claim the broader First Amendment Protected Rights afforded to the print media. The Eighth Circuit Court of Appeals in *Central Telecommunications, Inc. v. TCI Cablevision, Inc.*, 800 Fed. 2nd 711 (8th Circuit 1986), determined that more governmental regulation of the cable medium may be permissible because, among other things, cable requires use of public ways and enjoys universal access to the home. The Court relied for its decision upon the United States Supreme Court's opinion in *Los Angeles v. Preferred Communications, Community Communications v. City of Boulder*, 660 F.2d 1370 (10th Circuit 1981), and *Omega Satellite Products v. City of Indianapolis*, 694 F.2d 119 (7th Circuit 1982). The Eighth Circuit in *Central Telecommunications, Inc.* also determined that different communications media can be treated differently for First Amendment purposes.

7. Unquestionably, a State may subject any business entity that is afforded First Amendment Protected Rights to taxes imposed by the State. However, similarly situated entities must be treated the same. The Court finds that cable television programming requires a cable systems use of public property, which along with the distinct and unique benefits gained by cable from use of that property, distinguishes for constitutional purposes cable television from other communications media. The same is true in comparing cable television to wireless television or radio broadcasting, in addition to the fact that there are not "gross receipts or gross proceeds" generated by wireless television

or radio broadcasting on which the State sales tax could be imposed.

8. In the case of *Arkansas Writers' Project, Inc. v. Ragland*, 107 S.Ct. 36 (1987) the United States Supreme Court was faced with the question of the discriminatory applicability of Arkansas' sales tax. There, because the proceeds realized from the sale of certain magazines of a special content were exempted from Arkansas' sales tax, while other general interest magazines were subjected to the sales tax, the Supreme Court specifically held:

> "The Arkansas sales tax cannot be characterized as nondiscriminatory because it is not evenly applied to all magazines."

In that case, the Supreme Court held that the general sales tax was discriminatory because it was targeted at only a small group of magazines. Such case does not adversely affect the tax at issue in the present case. Arkansas' general sales tax is evenly applied to all cable television services and operations and is content-neutral. No small group of cable television operators is targeted by the tax. The same factual considerations make the specific ruling in *Minneapolis Star and Tribune Company v. Minnesota Commissioner of Revenues*, 103 S.Ct. 1365 (1983) inapplicable to the facts of the present case. No "special" tax is involved in the case at bar, nor does the tax operate unevenly on cable television operators or services. The extension of Arkansas' general sales tax to charges for cable television service was not an attempt to single out a business entity claiming First Amendment protected rights. The general sales tax applies to sales of tangible personal property and a variety of sales of services.

9. The case of *U.S. v. O'Brien*, 391 U.S. 367 (1968) establishes the test for determining whether governmental regulation is sufficiently justified under the First Amendment. The Court there held that:

> 1. The regulation must be within the constitutional power of the government;
>
> 2. The regulation must further an important or substantial interest;
>
> 3. The regulation must be unrelated to suppression of free expression;
>
> 4. Any incidental restriction of First Amendment Freedoms must be no greater than necessary to furtherance of the governmental interest.

The raising of revenue is an important or substantial governmental interest. It has never even been argued that the tax on sales of cable television service is suppressive of free expression. It has never been questioned that the power to tax is within the constitutional power of the government. Finally, the tax on sales of cable television service goes no further than is necessary to achieve the important or substantial governmental interest.

10. Based upon the evidence presented in this case and the applicable law, this Court finds that the plaintiffs' challenge is not well taken and should be denied. The statutory scheme of state and local sales taxation at issue does not discriminatorily apply the sales tax, nor is there any "facial" discrimination.

11. Because the Court has decided that the challenged sales taxes are constitutionally valid, the Court dismisses

plaintiffs' First Amendment claims. The plaintiffs' Equal Protection claims are also denied, because the sales tax is rationally related to a legitimate governmental interest. That is the test prescribed by *Streight v. Ragland*, 280 Ark. 206, 655 S.W.2d 459 (1983), and the test has been passed in this case.

Entered this 10th day of March, 1989.

/s/ Lee A. Munson
Chancellor

APPENDIX D

SUPREME COURT OF ARKANSAS

No. 89-89

Daniel L. Medlock, et al., Appellants	★	Appeal from the Chancery Court of Pulaski County, Arkansas, First Division
v.	★	
James C. Pledger, et al., Appellees.	★	

Filed April 2, 1990

Petitions for Rehearing are denied.

Dudley and Price, JJ., not participating.

APPENDIX E

SUPREME COURT OF ARKANSAS

No. 89-89

Daniel L. Medlock, et al., Appellants	★	Appeal from the Chancery Court of Pulaski County, Arkansas, First Division
v.	★	
James C. Pledger, et al., Appellees.	★	

Filed June 23, 1989

PORTION OF ABSTRACT OF TESTIMONY OF GAIL PRICE, MANAGER, SALES AND USE TAX SECTION, ARKANSAS DEPARTMENT OF FINANCE AND ADMINISTRATION

PROCEEDINGS OF MAY 9, 1988

Before the Honorable Lee A. Munson, Chancellor

"About 8 or 10 years ago, I participated in meetings at the Revenue Department concerning the taxation of cable television services and it was considered in that framework to be a taxable service already within the law as it existed (R. 1008-1009). The Revenue Division waited for the legislature to change the Sales Tax law to add cable television as a designated taxable service, because we just considered it another service that was taxable and we decided to wait so that it would be clear that it would be included within the statute. There was never any indication or statement made that cable television was going to be singled out for special tax treatment, it was just another service they were trying to make taxable." (TR 1010) (Appellant's Abstract, p. 103)